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NLRB GENERAL COUNSEL ARTHUR ROSENFELD ISSUES REPORT ON RECENT CASE DEVELOPMENTS

National Labor Relations Board General Counsel Arthur F. Rosenfeld today issued a report on casehandling developments in the Office of the General Counsel regarding the expanding use of neutrality agreements as an organizational tool. It also discusses a case involving prescribed Employer speech about the incumbent Union to new hires where the parties already have a collective-bargaining relationship.

(The General Counsel's report can be accessed in the press releases area of the NLRB web site: www.nlrb.gov or copies can be obtained by contacting the Division of Information at 202-273-1991.)

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REPORT OF THE GENERAL COUNSEL

During my term as General Counsel, I have pledged to keep the labor-management community fully aware of the activities of my office. It is my hope that this openness will encourage compliance with the Act and cooperation with agency personnel. As part of this goal, I have continued the practice of issuing periodic Reports of decisions raising significant legal or policy issues.

This report presents recent case developments regarding the expanding use of neutrality agreements as an organizational tool. It has long been settled that an Employer and a Union violate Section 8(a)(2) and Section 8(b)(1)(A), respectively, by granting and accepting recognition when the Union does not have the uncoerced support of a majority of bargaining unit employees. International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 737 (1961). Cases raising familiar questions of illegal assistance to and premature recognition of unions continue to be processed under well-established Board principles. However, considerations separate and apart from these traditional issues arise when Employers and Unions enter into recognition and/or neutrality agreements which, among other things, may provide for procedures during organizing campaigns, recognition upon a card check, and the parameters of a future collective-bargaining agreement. This report discusses recent developments in the Office of the General Counsel concerning such issues. It also discusses a case involving prescribed Employer speech about the incumbent Union to new hires where the parties already have a collective-bargaining relationship.

I hope that this information will be of assistance to the labor law Bar.

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Arthur F. Rosenfeld
General Counsel

Valid Neutrality Agreement and Uncoerced Card Check Majority

In one case, we dismissed Section 8(b)(1)(A) and Section 8(a)(2) and (3) charges involving the validity of a neutrality agreement. We concluded that the neutrality agreement between the Employer and the Union was valid and found that there was insufficient evidence to show that the union had obtained a card check majority through coercion.

The union and the employer had entered into a neutrality agreement whereby the employer waived its right to a Board conducted election in a specific unit and agreed to recognize and bargain with the union if the union established a majority in a card check. In exchange, the union agreed not to organize other employer facilities for twelve months. Shortly after the neutrality agreement was signed, the union demanded recognition based on authorization cards it had obtained in the desired unit. Pursuant to the neutrality agreement, the parties secured the services of an independent arbitrator to review the authorization cards and to determine whether the union had obtained majority status. The arbitrator reviewed the cards and verified that the union had attained majority status. That day the parties signed a recognition agreement.

Relying on *Verizon Information Systems*, 335 NLRB 558, 559 (2001), and *Briggs Indiana*, 63 NLRB 1270 (1945), we found that the neutrality agreement was valid. Thus, the parties reached agreement to establish a procedure of voluntary recognition outside the Board's processes, which included a pledge of neutrality on the part of the employer and a promise by the union not to undertake organizing certain other employees of the employer for a period of twelve months. The agreement included verification of union majority by a card check by an impartial third party.

The charging party had also asserted that the card check majority obtained by the union was obtained through union coercion. However, no witnesses supported the charge that the Union obtained cards by unlawfully harassing employees. The charging party further alleged that the recognition under the neutrality agreement was invalid based on two petitions that were circulated and signed by unit employees indicating that they did not wish to be represented by the union. Both

petitions were circulated after the Union and the Employer executed their recognition agreement. While the petitions asserted that the cards were obtained through harassment or were subject to a "suspicious" card check, the investigation of the charge, as noted above, revealed no evidence of harassment or coercion in the solicitation of authorization cards. Moreover, both an arbitrator and the Region verified the union's numerical majority of cards. Since the investigation failed to establish any evidence of harassment or coercion in the solicitation of the authorization cards, we decided to dismiss the charges.

Employer and Union Unlawfully Dealt with Each Other and Employees on Wage Increase during Organizational Campaign Under Neutrality Agreement

In this case, we decided that the Employer's and the Union's dealings concerning the postponement and rescheduling of a promised wage increase violated the Act. The Employer had other facilities already represented by the Union and had previously agreed to a neutrality agreement providing that the Employer would remain neutral during all Union organizing campaigns.

The facility at issue in this case was in the midst of an organizing campaign when the Employer contacted the Union for its position regarding a scheduled wage increase. The Employer sent a letter to the Union setting out its plan to initiate the pay raise and asked the Union for comments. The Employer subsequently provided the Union with a more detailed analysis of its scheduled wage increase. The Union requested that the Employer postpone the wage increase.

Thereafter, the Employer circulated a memo to the employees incorrectly stating that federal law prohibits unilateral increases in wages unless the union agrees and that therefore the wage increase could not be given. One month later, the Employer announced to employees that it had obtained the consent of the Union and the wage increase was to be implemented retroactively. The Union circulated its own memo stating that it had informed management that it supported a pay raise and in would not file an unfair labor practice charge.

We initially concluded that the Employer violated Section 8(a)(1) by placing the onus of the delay in the scheduled wage

increase on the Union. We also concluded that a complaint was warranted to place before the Board the allegations that: the Employer violated Section 8(a)(2) and (1) and the Union violated Section 8(b)(1)(A) by virtue of their discussions that led to the postponement and the subsequent grant of the previously announced pay raise; and that the Employer unlawfully assisted the Union in violation of Section 8(a)(2) by informing the employees that it was granting the wage increase based on the Union giving its consent. In our view, by acting in a manner that fostered the false impression that Union consent was necessary before the employees could receive a scheduled wage increase, the Employer granted and the Union accepted the status of a collective bargaining representative. As a result, the Union was given control over an important employee benefit even though there was no showing that the Union represented a majority of the employees. To the contrary, the investigation established that during this same period, the Employer had been presented with a petition apparently signed by a majority of the unit who did not wish to be represented by the Union.

It is well settled that recognition of a minority union is unlawful under Section 8(a)(2). See *Ladies Garment Workers (Bernhard-Altmann Corp.) v. NLRB*, 366 U.S. 731 (1961). In that case, the Court found that the union violated the Act because a union cannot accept and act with authority over employees' terms and conditions of employment when it does not have the support of the majority of employees. The Court upheld the Board's view that the imposition of a representative on a nonconsenting majority was a violation of Sections 8(a)(1) and (2) and 8(b)(1)(A).

Moreover, it is a violation for a union to participate in conduct that tends to coerce employees in the exercise of Section 7 rights. Any argument raised by the Union that it had no control over how the Employer was going to handle the proposed wage increase was belied by the fact that the Union readily accepted the opportunity to prevent the Employer from granting an already promised pay raise. The Union also did nothing to correct the unlawful characterization by the Employer of the Union's role in the course of these events. Thus, we concluded that the Union violated Section 8(b)(1)(A) by accepting its role as partner with the Employer in determining when to grant the pay raise since it was not the majority representative of the employees at the time the Employer made

the decision to postpone the wage increase. See *Bernhard-Altmann*, above.

Unlawful Recognition Pursuant to Card Check Procedure Of Neutrality Agreement Due to Contemporaneous Disaffection Petition

In another set of cases, we decided that the Employer's recognition of the Union pursuant to an agreed-upon card check procedure was unlawful where, on the date of recognition, the Union did not have a card majority because a disaffection petition signed by a determinative number of employees in the bargaining unit was in existence.

Subsequent to the Union's commencement of its organizing campaign, the Union and the Employer executed a Memorandum of Agreement where the parties set forth a number of provisions relating to the Union's organizing campaign. The Agreement provided that the Employer would recognize the Union if the Union demonstrated majority support pursuant to a card check by a neutral third party.

During the Union's organizing campaign, and prior to the Employer's voluntary grant of recognition to the Union, a group of employees gathered signatures from other employees in support of an anti-union petition. The petition was signed by 43 of the 90 employees who were indisputably in the bargaining unit. Of those, 18 had previously signed union authorization cards and 12 of those 18 also took steps formally to revoke their cards. Neither the Employer nor the Union was presented with this petition prior to the card check and the Employer's grant of recognition. However, the anti-union petition and the revocation letters were sent to an NLRB Regional Office by certified mail.

When the authorization card verification check was carried out as provided in the parties' agreement, the neutral third party concluded that the Union had the support of a majority, 48 of the 90 employees in the agreed-upon unit. Based on that card check, the Employer immediately recognized the Union. However, unknown by the parties, 6 of the 48 employees had later signed the antiunion petition on file in the NLRB Regional office (43 employees in total signed the anti-union petition). Because the Union's majority status required the inclusion of the six cards

signed by the employees who later signed the anti-union petition, the Union did not, in fact, have a majority.

On the same date it granted recognition to the Union, the Employer received a copy of the anti-union petition via fax from one of the employees who helped obtain the petition signatures. However, the petition was not faxed until after the completion of the card check and the employer's grant of recognition. Subsequently, the Union and the Employer negotiated the terms of a collective-bargaining agreement. The agreement was ratified and went into effect except for the union security and dues check-off clauses.

While the Employer here may have recognized the Union in good faith, we concluded that it violated Section 8(a)(1) and 8(a)(2) by granting recognition pursuant to the card check, and that the Union violated Section 8(b)(1)(A) by accepting such recognition, because at the time recognition was granted, the union did not, in fact, have demonstrable majority support. In deciding that good faith of the parties is not a defense where a union did not actually have majority support, we relied on *International Ladies' Garment Workers' Union v. NLRB [Bernhard-Altmann]*, 366 US 731, 736-738 (1961). In *Bernhard-Altmann,* the Supreme Court held that an employer unlawfully granted recognition to a minority union and unlawfully negotiated and executed a collective bargaining agreement with that union, where at the time of recognition the union did not in fact have cards from a majority of the unit employees. Both the union and the employer believed that the union had cards from a majority of the proposed unit, but the union was in error and the employer did not check. Similarly, the Board stated in *Alliant Foodservice, Inc*., 335 NLRB 695, 697 (2001), "We acknowledge that an employer, like Alliant, could recognize a union in good faith and unwittingly violate Section 8(a)(2) if, it turns out, majority support does not, in fact, exist."

Bernhard-Altmann and the cases we decided here illustrate the risks of voluntary recognition generally. Authorization cards, on which voluntary recognition is often based, are typically collected during the organizing campaign over a period of time and employee sentiment can fluctuate over the course of the campaign. While acknowledging the benefits of voluntary recognition, the Board and courts nevertheless have recognized that a Board-conducted election provides the most reliable basis for determining whether employees desire representation by a

particular union. *Linden Lumber v. NLRB*, 419 US 301 (1974). Board elections provide for a secret vote under laboratory conditions and under the supervision of a Board agent. Voluntary recognition, based on cards or similar indicia solicited by the union, does not guarantee these protections and so, while legitimate, is a less reliable method of establishing majority support. See, for example, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support").

Proof that employees signed authorization cards for two different unions or proof that employees signed petitions inconsistent with their cards can permit an inference that a union lacked the support of a majority at the time of recognition. For example, the Board has consistently held that where an employee signs an authorization card for each of two unions, neither card is counted in establishing the majority status of either union unless it can be clearly established that one of the two cards was repudiated by the dual card signer. See *Flatbush Manor Care Co.,* 287 NLRB 457, 458, 471 (1987) (employer violated Section 8(a)(2) by recognizing a union where five of six card signers also signed cards for another union), and *Katz's Delicatessen,* 316 NLRB 318, 330 (1995), enf'd 80 F.3d 755 (2d Cir. 1996) (where union card signers subsequently signed a petition on behalf of another union, the union cards could not be counted toward majority support for that union). An employer and a union also violate Sections 8(a)(2) and 8(b)(1)(A), respectively, even if they do not know that a determinative number of employees signed cards for a different union. *Le Marquis Hotel*, 340 NLRB No. 64 (2003), slip op. at 9 (while employer may not know about the dual cards, if it recognizes a union without the confirmation of a representation election, it assumes the risk of mistaking the extent of the union's support, and of committing the unfair labor practices associated with the recognition of a minority union).

In connection with the general principles that these cases illustrate, we also decided to recommend to the Board that it reconsider and reverse the line of cases holding that an employee's revocation of a signed authorization card is not effective until received by or communicated to the union. See *Alpha Beta Co.,* 294 NLRB 228, 230 (1989). The rule that effective revocation of an authorization card requires notice to the union has been criticized as contrary to the principles of protecting employee free choice. See *Struthers-Dunn, Inc. v.*

NLRB, 574 F.2d 796 (3d cir. 1978), criticizing 228 NLRB 49 (1977). In that *Gissel* case, subsequent to the union's demand for recognition but prior to a stipulated election, a disaffection petition that revoked some previously signed authorization cards was mailed to the Regional Office but not to the union. The Board held that the petition did not alter the card majority of the union at the time the union demanded recognition and that the cards could not be effectively revoked in the absence of notification to the union prior to the demand of recognition. The Third Circuit, by contrast, concluded that this position did not "accord proper recognition to the free and voluntary expression of opinion by the employees." 574 F.2d at 801.

The Board has not followed the *Alpha Beta* principle in the dual card cases, where it has cautioned that while employers may rely on a majority showing of cards where two unions are gathering cards, it acts at its peril if the recognized union does not in fact enjoy majority support. See e.g., *Bruckner Nursing Home*, 262 NLRB 955, 957-58 & n.13 (1982), cited in *Le Marquis Hotel*, above, 340 NLRB No. 64, sl. op. 7 (employee's execution of second union authorization card for competing union indicates shifting employee sentiments, despite lack of notice to the first union of the employee's shifting support; no reference to *Alpha Beta* or principles articulated therein). Therefore, we decided to recommend that the Board should "accord proper recognition to employee free choice" and find that an employee's card is effectively revoked by signing of a disaffection petition even if the employee has not communicated that disaffection to the union, and that cases to the contrary, such as the Board's decision in *Struthers-Dunn*, above, should be reversed.

Partnership/Neutrality/Card Check Agreement Amounted to Unlawful Recognition and Bargaining In Advance of Union Obtaining Majority Status

In several cases involving a Union's organizing campaign at two of the Employer's facilities, we decided that the parties unlawfully used a partnership agreement as a vehicle to negotiate terms and conditions of employment for employees whom the Union did not yet represent. In our view, these agreements violate Section 8(a)(1) and (2) and Section 8(b)(1)(A).

In August 2003, the Employer and the Union entered into a national partnership agreement. Most of the 17-page agreement was devoted to setting ground rules for the Union's ongoing organizing campaign and to establishing procedures whereby an independent neutral party could ascertain if the Union had obtained signed authorization cards from a majority of employees prior to the Employer's formal grant of recognition. Several pages of the Agreement, however, addressed the parties' substantive understandings regarding appropriate terms and conditions of employment should the Union be recognized as the employees' bargaining representative. Thus, the partnership agreement specified a minimum duration for any negotiated agreement and set forth additional mutual understandings regarding no strike-no lockout terms; interest arbitration; healthcare costs; minimum job classifications; flexible compensation; and mandatory overtime rules.

At one facility the Union did not demonstrate its majority support through a third party card check until after the signing of the partnership agreement and the announcement of the agreement and some of its terms to the employees. At the other facility, the Union has never demonstrated majority support.

Although card check agreements that limit an employer's expression of opposition to its employees' unionization can be legal, we decided to issue a complaint and argue that the agreement here, because of the substantive provisions noted above, impermissibly settled some terms and conditions of employment to be included in a future collective-bargaining agreement and narrowed the areas of disagreement between the parties on other conditions of employment. By negotiating these substantive terms, the Employer effectively both recognized the Union and engaged in collective bargaining prior to the Union's demonstration of majority support, in violation of Section 8(a)(2).

It has long been recognized that an employer's recognition of a union that has not been selected by a majority of the bargaining unit constitutes a form of unlawful support or assistance to that union and interference with the free choice of those employees in violation of Section 8(a)(2). See *International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann)*, 366 U.S. 731, 736-738 (1961); *Wilkes Corp.*, 197 NLRB 860, 860 n.2. (1972); *Nitro Super Market*, 161 NLRB 505, 515 (1967); *Majestic Weaving Co.*, 147 NLRB 859, 860 (1964), enf.

denied on other grounds 355 F.2d 854, 859-860 (2d Cir. 1966).

In *Majestic Weaving Co.*, above, the Board overruled *Julius Resnick, Inc.*, 86 NLRB 38 (1949), and held that an agreement to terms of a contract with a minority union constituted unlawful support. The Board reasoned that employee rights were clearly abridged by an employer's treating a minority union as the bargaining representative for the unit. The Board flatly asserted that the fact that the employer conditioned the actual signing of the contract on the union's "achieving a majority at the 'conclusion' of negotiations is immaterial." 147 NLRB at 860. The Second Circuit, although declining enforcement on procedural grounds, stated, "we would entertain no difficulty if the Board, after appropriate proceedings, should fashion for prospective application a principle along the general line of that adopted here; rational basis plainly exists for some such specification of the language of § 8(a)(2) even in cases like this where no other union was on the scene when the negotiations occurred." *NLRB v. Majestic Weaving Co.,* 355 F.2d 854, 859-860 (1966).

In our cases, three general factors supported the conclusion that the partnership agreement crossed the threshold from a permissible agreement merely settling procedures for resolving questions concerning representation to an agreement that is tantamount to a grant of recognition that unlawfully assisted the union in gaining employee support. First, the agreement is not limited to procedural issues or "principles" relating to the settling of representation disputes. Unlike neutrality agreements found lawful in the past, the agreement here included a preliminary Employer and Union agreement on substantive employment terms such as overtime, job classifications, health benefits, and contract duration. In addition, the Employer's agreeing to an interest arbitration provision in exchange for the Union's no-strike pledge guaranteed employees a collective-bargaining agreement, either through negotiations at the table or pursuant to the award of an independent arbitrator.

In our view, the employees could easily surmise that their employer had already implicitly recognized the union as their representative. An employer's making such an agreement regarding working conditions with a union that the employees have never chosen to represent them reasonably tends to establish that union in a privileged position in the employees'

eyes. Because of this employer assistance, the union is no longer "merely an outsider seeking entrance" (*NLRB v. Golden Age Beverage*, 415 F.2d 26, 30 (5th Cir. 1969)), but an insider seeking ratification of a representational relationship already agreed to by their employer without regard to the unit employees' views.

Second, the conclusion that the Employer granted implicit recognition is also established through examination of the parties' conduct in light of the Board's standard for what constitutes voluntary recognition. "Bargaining with a union is, of course, one of the ways an employer can implicitly recognize a union." *Operating Engineers Local 150 v. NLRB [Terracon, Inc.]*, 361 F.3d 395, 400 (7th Cir. 2004), enforcing 339 NLRB No. 35 (June 6, 2003).

The limited provisions that the Employer and the Union here disclosed to the employees confirm that the so-called "aspirational agreements" reached by the parties in fact manifested a mutual commitment to minimum job classifications, flexible compensation, mandatory overtime, and the like. These mutual understandings, which narrowed the differences between the parties over working conditions, were the product of exactly the kind of bargaining over substantive terms that the Act reserves for majority representatives. They also demonstrate that concessions were made at the expense of the employees whom the Union did not represent at the time of the agreement. The agreed-upon concessions sacrificed for at least four years the right of the future represented employees to strike and guaranteed collective-bargaining agreements with such terms and conditions of employment as healthcare costs containment measures, mandatory overtime, and minimum job classifications. The Agreement ultimately assigned other employee interests to binding arbitration in accordance with the principles and policies agreed to by the Employer and the Union prior to the Union's having achieved the support of a majority.

A third feature of these cases served to magnify the impact of premature recognition on the employees' right to refrain from having the union represent them. Because the partnership agreement contained confidentiality provisions, only the Union and the Employer knew the exact nature of the agreement with respect to substantive matters. Employees to be covered by the agreement could see the document only if they made a special request, but otherwise knew only what the Union and the Employer chose to tell them about it. What they did learn — the

substantive provisions discussed above — was sufficient to warrant the employees' inferring that the Union was already functioning as their Employer-recognized representative. But where, as here, that employer-union agreement is generally kept confidential from the employees themselves, the impression that the union has a special insider relationship with the employer is magnified, because employees can only speculate as to the extent of the special arrangements the employer may have made with the union about their working conditions.

In sum, the Employer's confidential agreement with the Union dealing with working conditions manifests to the employees that the Employer had already engaged in the kind of give-and-take bargaining about unit working conditions that is tantamount to recognizing a minority union as the unit employees' representative.

We did dismiss another case involving the same Employer and Union, because the Union had obtained majority support through authorization cards *prior to* the execution of the national partnership agreement, and thus it could not have had the effect of a pre-recognition agreement that unlawfully assisted the Union in gaining employee support.

8(e) Agreement Limiting Employer's Future Investments To Companies which Union Could Later Require to Execute Neutrality Agreement

In a case of first impression, we decided that the Union and Employer violated Section 8(e) when they entered into an agreement limiting the Employer's future investments to companies which the Union later could require to be bound by a Neutrality Agreement.

The Employer was an investment firm; the Union did not represent any of the Employer's employees. In November, 2000, the Employer and the Union entered into an agreement consisting of two parts: a Side Agreement and a Neutrality Agreement. The Side Agreement specified how the parties would require certain companies called "covered business enterprises" (CBE) to also be bound to the parties' agreements, in particular the Neutrality Agreement. The Side Agreement defined a CBE as one in which the Employer:

> directly or indirectly (i) owns more than 50 percent of the common stock; (ii) controls more than 50 percent of the voting power; or (iii) has the power, based on contracts, constituent means, to direct the management and policies of the enterprise . . .

The Side Agreement then provided that no less than six months after the Employer had invested in a CBE, the Union might notify the Employer of the Union's intent to organize that CBE. The Employer would then require the CBE to execute the Neutrality Agreement.

The Neutrality Agreement provided that any signatory CBE would grant the Union access to its premises to distribute information and to meet with employees; furnish the Union with employee names and addresses; and recognize the Union based upon a majority showing after a neutral card check procedure. Upon a showing of majority support, the CBE would bargain within 14 days of recognition, and would submit to interest arbitration any open issues after 90 days of bargaining. The Section 8(e) charge attacked not the Neutrality Agreement itself, but only the Side Agreement, which limited the Employer's choice of investments to those companies that might be required to sign the Neutrality Agreement.

In June 2002, the Employer acquired a manufacturer of industrial products. On July 11, 2003, the manufacturer and the Union entered into a similar set of Side and Neutrality Agreements, pursuant to the Employer’s direction based on its Side Agreement. The Employer admitted that it had required the manufacturer to enter into those Agreements pursuant to the November 2000 Side Agreement. The manufacturer's Side Agreement explicitly stated that the manufacturer had entered into its Neutrality Agreement as a CBE defined by the Employer's November 2000 Side Agreement.

We first decided that the manufacturer's execution of its Neutrality Agreement in July 2003 was an application or reaffirmation of the Employer's November 2000 Side Agreement. The Section 8(e) charge filed on August 6, 2003, against that two-year old Side Agreement therefore was a timely filed charge. We then decided that the Employer's Side Agreement violated Section 8(e) because it contained a "cease doing business object" in that it limited the Employer's choice of investments to those entities which would be worthwhile investments even if

they became bound to a Neutrality Agreement. Moreover, it was secondary because it did not concern organizing the Employer's employees but rather was directed at the organizational relations of the Union and other, separate entities.

Section 8(e) makes it an unfair labor practice for a union and an employer "to enter into any contract or agreement, express or implied, whereby such employer . . . agrees to . . . cease doing business with any other person . . . ." The Board has applied the Section 8(e) "cease doing business" proscription to agreements that impose only a partial cessation of business and, in particular, to agreements that interfere with business investment decisions. Carpenters Dist. Council of Northeast Ohio (Alessio Constr.), 310 NLRB 1023, 1025 n.9 (1993). To determine whether a "cease doing business" agreement is secondary and unlawful, the Board considers whether the agreement addresses the labor relations of the contracting employer regarding its own employees, or is "tactically calculated to satisfy union objectives elsewhere." National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 620, 623-639 (1967).

As to "cease doing business" object, in Alessio, the Board found unlawful the parties' "integrity clause" which provided that, where the employer participated in the formation of another company that engaged in the same or similar business or employed similar employees, the employer's collective-bargaining agreement would apply to the second business. The Board found that this "integrity clause" had a "cease doing business" object because it was "calculated to cause Alessio to sever its ownership relationship with affiliated firms . . ." by requiring Allesio to apply its bargaining agreement to such firms. Cf. Painters Dist. Council 51 (Manganaro Corp., MD), 321 NLRB 158, 164-167 & n.20 (1996) (distinguishing Alessio and finding lawful an anti dual-shop clause, where the clause on its face preserved unit work of signatory employer, and where the signatory employer had effective right to control the dual shop).

We recognized that the investment restriction in Alessio involved the actual imposition of the parties' entire bargaining agreement, while the Side Agreement investment restriction here involved the possible imposition of only the Neutrality Agreement. However, the Side Agreement on its face did restrict the Employer's investment decisions. The Employer agreed to invest only in entities that must become bound to their own Side and Neutrality Agreements if the entity were a CBE under any of

the criteria in the Side Agreement, and if the Union subsequently invoked the Neutrality Agreement. We therefore decided to issue a complaint arguing that the potential imposition of the Neutrality Agreement was a clear restriction, limiting the range of businesses in which the Employer may choose to invest, sufficient to have a Section 8(e) "cease doing business" object.

Although the Side Agreement did not mandate the automatic, immediate application of the Neutrality Agreement, the fact remained that it would be implemented subsequently at the Union's option. Therefore, these time and Union option conditions did not eliminate the impact of the investment restrictions. Rather, these conditions merely delayed the actual effect of these investment restrictions until the Union decided to organize the CBE.

As to its secondary nature, the terms of the Side Agreement investment restriction did not concern the labor relations of the Employer. Rather, the investment restriction was directed solely at the organizational relations of any CBE of the Employer. Therefore, if a CBE were a separate employer, the investment restrictions were secondary because they necessarily would be "tactically calculated to satisfy union objectives elsewhere."

We noted that if the Side Agreement were applicable only to CBEs that constitute a “single employer” with the Employer, no Section 8(e) violation could arise because two separate employers would not exist to “cease doing business.” We concluded, however, that the Side Agreement was not limited by its terms to CBE entities that constitute a single employer with the Employer. The Side Agreement applied to entities which the Employer merely owned or over which it controlled voting power. Neither ownership nor voting power control is sufficient to establish “single employer status.”

In sum, the Side Agreement, in our view, violated 8(e) on its face. It had a partial "cease doing business" object because it limited the range of businesses in which the Employer was able to invest by requiring the potential imposition of the Neutrality Agreement. It was secondary in character because it was directed at the organizational relations of other, separate entities.

Amicus Brief in Representational Cases Urging Board to Retain Voluntary Recognition Bar With Limited Exception in Certain Circumstances

In addition to the unfair labor practice complaints discussed above, we filed an amicus brief with the Board in consolidated representation cases (*Dana Corp.* and *Metaldyne Corp.*, 341 NLRB No. 150 (2004)), where the employers had granted the unions voluntary recognition based upon a majority authorization card showing, pursuant to neutrality and "card check" agreements between the employers and unions. Employees in each case filed decertification petitions, dismissed by the Regional Directors under the Board's long-standing "recognition bar doctrine." Pursuant to that policy, the Board will not process election petitions for a reasonable period of time after voluntary recognition. *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966).

In its decision to review the dismissals of the petitions in these cases, the Board signaled its view that they raise substantial issues as to whether, and under what conditions, an employer's voluntary recognition of a union should bar a decertification petition. We took the position before the Board that the recognition bar should be retained as an important and effective means of promoting voluntary recognition and of furthering the purposes and policies of the NLRA, but that a limited exception is warranted in certain circumstances raising a significant question of whether the union actually had majority support when recognition was granted.

As discussed in our brief, both Board-conducted elections and voluntary recognition are accepted ways of establishing a legally valid collective bargaining relationship. A Board-conducted election is the most reliable way of determining whether a majority of bargaining unit employees desire exclusive representation by a particular union. See *Linden Lumber v. NLRB*, 419 U.S. 301, 304 (1974), citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969); *NLRB v. Cayuga Crushed Stone*, 474 F.2d 1380, 1383 (2d Cir. 1973) (discussing procedural safeguards and secrecy of Board elections). A card check procedure is a less reliable, but nevertheless legitimate, way to demonstrate that a majority of employees support a particular union. See *Gissel*, 395 U.S. at 602. Because of its practical advantages of quickly permitting bargaining to commence where that is the

desire of the employees and employer, the Board and the courts have sanctioned voluntary recognition based on a card check since the earliest days of the NLRA as a "favored element of national labor policy." *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir. 1981), citing *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978).

In our brief, we took the position that the Board should retain the voluntary recognition bar because it effectuates the purposes of the NLRA in several ways. As with the similar bar that is imposed after the Board has certified a union pursuant to a Board-conducted election, the voluntary recognition bar, among other things, gives a union time to negotiate an agreement without undue pressure and removes incentives for an employer to delay or undermine bargaining in hopes of ousting the union. See *Brooks v. NLRB*, 348 U.S. 96, 98, 100-101 (1954); *NLRB v. Broad Street Hospital & Medical Center*, 452 F.2d 302, 304-305 (3d Cir. 1971). The aim of the bars is to ensure that the bargaining representative, once validly chosen by a majority of employees, has the opportunity to engage in effective bargaining to obtain a contract without interruption. See *San Clemente Publishing Corp.*, 167 NLRB 6, 8 (1967), enfd. 408 F.2d 367, 368 (9th Cir. 1969).

However, we further argued that an exception to the recognition bar is warranted in certain circumstances because of the inherently less reliable nature of authorization cards, compared to a Board-conducted election, as an indicator of employee choice. Unlike a card-check agreement, a Board election is a "solemn" occasion, conducted under "safeguards to voluntary choice," including the "privacy and independence of the voting booth." *Brooks*, 348 U.S. at 99-100. In further contrast to certifications, where the election date is certain, in the card check context employees generally will not know when majority status is achieved or when recognition will be granted. Therefore, if during the card collection period individuals change their minds as to their desire for representation, they may not know when to revoke their cards in order to ensure that their true intention is not misrepresented by a count that includes them.

Given the lesser safeguards associated with the use of authorization cards, we stated that there is a need for some limited exception to the current voluntary recognition bar doctrine. This need is evidenced by cases applying the bar where employee activity, contemporaneous with or shortly after

the recognition, indicated that the card count supporting recognition did not, in fact, reflect the deliberate choice of employees that would justify the imposition of a bar. See *Montgomery Ward & Co.*, 162 NLRB 294 (1966), enfd. 399 F.2d 409 (7th Cir. 1969); *Rockwell International Corp.*, 220 NLRB 1262 (1975). Such cases illustrate our point that while stability is a benefit of applying the recognition bar, the bar should not apply in order to "stabilize" a new relationship where it is so immediately evident that majority support for the recognized union is doubtful.

Accordingly, we proposed in the amicus brief that the Board allow, as a limited exception to the voluntary recognition bar, the holding of an election in situations where support, either for representation by another union or for no union representation, is expressed in writing by at least 50 percent of the bargaining unit employees either at the time the employees receive formal, written notice of the employer's recognition of the union, or no later than 21 days thereafter. We further proposed that a decertification petition must be filed no later than 30 days after that formal notice of recognition.

We took the position that any showing of less than 50 percent opposition would not support an inference that a majority of employees likely did not actually support the union at the time of recognition; a minority of employees usually oppose representation even in organizing drives culminating in certifications following a Board election. Moreover, because there has already been a showing of majority that has not been challenged in an unfair labor practice proceeding, reliance on the usual "showing of interest" for an RD petition (30 percent) is insufficient to justify an exception to the recognition bar.

Our rationale for the proposed 21-day cutoff for the showing of interest was that a more extended period could allow time for active undermining of a union's valid majority support, essentially continuing the organizing campaign and contributing to the very instability that an election bar is meant to prevent. Allowing 30 days for the actual filing of the petition would accommodate situations where employees may be unrepresented and/or unfamiliar with Board procedures. Further, in order to avoid litigation over when those 21- and 30-day periods begin, we proposed that the Board require that they

begin when the employer and/or the union give formal written notice to the unit employees of the voluntary recognition.

Finally, we argued that this position should apply regardless of whether voluntary recognition is established pursuant to a card check agreement preceding card-signing and accompanied by a neutrality agreement, as in the cases before the Board, or pursuant to an *ad-hoc* card check after employees sign cards. In both instances, the voluntary recognition must be based on cards signed freely by a majority of employees to be legitimate.

In sum, we took the position that the recognition bar doctrine, with our proposed limited exception, balances two competing goals: on one hand, the right of a newly recognized union, designated by a majority of employees, to enjoy the benefits of exclusive representative status free of challenge for a reasonable period; and on the other, the need to guarantee employee free choice by deterring the entrenchment of a union that does not truly enjoy uncoerced majority support.

Our brief to the Board can be found in its entirety at: http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/NLRBGC.pdf.

8(c) Privileges Contractual Requirements that Employer Encourage New Employees to Join Incumbent Union and Grant Union Access to Orientation Meetings

We concluded in this last case that a clause in a collective bargaining agreement requiring the employer, in a right-to-work state, to "recommend" to new employees that they become members of the union had represented them, and to grant the union access to new employees during orientation meetings, did not violate Sections 8(a)(2) and (1) and 8(b)(1)(A). Under Section 8(c) of the Act, an employer has a right to express views for or against a union so long as the expression does not contain threats of reprisal or promises of benefit.

The Employer regularly held orientation meetings for new employees during which a low-level, non-production supervisor, reading from a prepared text, recommended that the employees become members of the union. The Employer would inform employees that the Union would be given a chance to meet with them during the meeting. When it was the Union’s turn to address the employees, a steward, usually from the shift to

which the employees were to be assigned, would take over the meeting on behalf of the Union. The steward would hand out a packet of information to the employees, including the application for membership and dues checkoff authorization forms.

While there was no uniform practice regarding the role of management during the union-led portion of the orientation meetings, management officials would normally leave the room for some period of time and re-enter before the meeting ended. There was no evidence establishing that these managers either actually observed employees signing any documents provided to them by the Union or individually encouraged them to do so. Additionally, while there was some evidence that the company may have collected cards among other documents that were signed by the employees, these collections were for the purpose of providing the materials to the Employer’s human resources department for processing.

We concluded that where there is an incumbent union, an employer does not violate the Act by merely encouraging employees to join the existing union and allowing the recognized bargaining agent to meet with new employees. See, e.g. *Duquesne University*, 198 NLRB 891 (1972). Thus, the situation differed from organizing campaigns as in *Famous Castings Corp.,* 301 NLRB 404, 407 (1991), where a supervisor told an employee to talk to union representatives and, after they left, gave an employee authorization cards to distribute. This conduct violated Section 8(a)(2), since it was "not a situation where a company was engaging in friendly cooperation with an incumbent union."

There were no threats, no promises of benefits, and no evidence that supervisors individually pressured employees to sign cards. In these circumstances, under Section 8(c) the Employer could lawfully "recommend" membership in the incumbent union to employees at an orientation meeting.